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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1301

GANNETT CO., INC.,

Petitioner,

v.

HON. DANIEL A. DePASQUALE, County Court Judge of Seneca County, New York, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the State of New York Court of Appeals

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Respondents.

Petition for a Writ of Certiorari to the State of New York Court of Appeals

The petitioner Gannett Co., Inc. ("Gannett") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the State of New York Court of Appeals entered in this proceeding on December 19, 1977. Respondents are Hon. Daniel A. DePasquale, County Court Judge of Seneca County, New York; Kyle E. Greathouse; David R. Jones; and Stuart O. Miller, District Attorney of Seneca County, New York. Mr. Miller, at the time of the events pertinent to this proceeding, was the Public Defender representing David R. Jones but was thereafter elected District Attorney. He is substituted as a party pursuant to Rule 48(3) of the Court.

Opinions Below

The opinions of the New York Court of Appeals dated December 19, 1977 are set forth in the Appendix at 2a[1] and are reported at 43 NY2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756. The opinion of the Supreme Court of the State of New York, Appellate Division, Fourth Department dated December 17, 1976 is set forth at 21a and is reported at 55 AD2d 107, 389 N.Y.S.2d 719. The orders of the trial court dated November 4, 1976 and November 17, 1976, excluding the public and press from a pre-trial suppression hearing and denying access to the transcript thereof, are set forth at 29a and 33a and are unreported.

Jurisdiction

The judgment of the State of New York Court of Appeals was entered on December 19, 1977. A timely motion for reargument was denied on January 12, 1978, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

Questions Presented

1. May the press and public, consistently with the First, Sixth and Fourteenth Amendments to the United States Constitution, be ejected from a traditionally public pretrial suppression hearing when a trial judge believes that publication by the press of truthful statements concerning the hearing might threaten the right of a defendant to an impartial jury?

[1]References to "__a" are to the pagination of the Appendix to this Petition; references "__r" are to the pagination of the Record in the New York Court of Appeals.

2. Does an order excluding the press and public from a pretrial suppression hearing, issued without notice, hearing or findings of fact, deprive the press and public of their First and Sixth Amendment rights without due process of law?

Constitutional Provisions Involved

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

The Sixth Amendment to the United States Constitution provides, in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury . . ."

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

Statement of the Case

The Factual Background

In mid-July, 1976, Wayne Clapp, formerly a policeman in a suburb of Rochester, New York, disappeared. On July 21, 1976, Kyle E. Greathouse and David R. Jones were arrested in Michigan and charged with Clapp's murder (26-27r). Following their extradition to New York, Greathouse and Jones were indicted for Second Degree Murder in Seneca County, New York, approximately forty miles from Rochester and the site of the homicide.

Gannett is the owner of two daily Rochester newspapers, whose circulation extends to Seneca County. Gannett reporters were assigned to observe and to report upon both the murder investigation and the post-arrest criminal proceedings, which the District Attorney and defense attorneys had described as "novel" and "complex" (26-28, 61r) because the corpse of the victim had never been found.

On November 4, 1976, an evidentiary suppression hearing was scheduled to take place before Seneca County Court Judge DePasquale. At the commencement of the hearing, the defendants moved to exclude both the press and the public from the courtroom, asserting only that "we are going to take evidentiary matters into consideration here that may or may not be brought forth subsequently at a trial . . ." (30a). The prosecutor acquiesced in the request, and the court, with no further inquiry, granted it, stating:

> ". . . these matters are in the nature of a Huntley hearing and suppression of physical evidence, and it is not the trial of the matter. Certain evidentiary matters may come up in the testimony of the People's witnesses that may be prejudicial to the defendant, and for those reasons the Court is going to grant both motions" (31a).[2]

No evidence and no other explanations were offered in support of the closure. The courtroom was cleared, and the hearing commenced.

During the hearing a Gannett reporter, who had been ejected, submitted a written request to the Court seeking a postponement of the proceeding to enable attorneys to argue against the closure (73r). The request was denied and the hearing concluded on that Friday afternoon.

[2]The entire colloquy among the parties at the time of the exclusion is set forth at 30-31a.

How Federal Questions Were Presented

On Monday morning, November 8, 1976, Gannett attorneys moved, by order to show cause, to vacate *nunc pro tunc* the closure order and to gain access to the stenographic transcript of the hearing, on the grounds that the court's order (1) had abridged First and Sixth Amendment rights of the press and public to attend and to disseminate news of the hearing, and (2) had been issued in a procedurally improper manner (42a). The trial court refused to permit argument on the merits of the Gannett motion until November 16, 1976 when it adhered to its earlier order, declaring there were no "authorities that make it incumbent upon the defendant, or defendants in this case, to present a factual basis for the exclusion of the public and press" (37a). In addition, the court denied access to the hearing transcript in perpetuity (34a at ¶3).

The Proceedings in the Courts Below

The following day, an original proceeding in the nature of prohibition and mandamus, challenging the closure orders on First, Sixth and Fourteenth Amendment grounds, was commenced by Gannett in the Supreme Court of the State of New York, Appellate Division, Fourth Department. On December 17, 1976 that Court unanimously held that the exclusionary orders transgressed the public's "vital interest in open judicial proceedings, especially criminal proceedings" (23a) and further constituted an unjustified prior restraint on publication which violated the First Amendment. It accordingly vacated the trial court's orders.

Prior to the decision of the Appellate Division, both defendants had pleaded guilty to lesser crimes in satisfaction of the indictments pending against them (5a).

On appeal, the New York Court of Appeals dismissed the case as technically moot. However, describing the critical importance of the matter to both the courts and the news media, it retained jurisdiction and, in a 4-2 opinion, upheld the ejection of the public and press from the courtroom.

Relying upon the judiciary's "inherent power to limit public access" (7a), and noting the reservation of the question by this Court in *Nebraska Press Assn. v. Stuart,* 427 U.S. 539, 564 n. 8 (1976) (10a), the majority declared:

> ". . . Knowing . . . that widespread knowledge even of inadmissible evidence could nonetheless predetermine guilt . . . we require the Trial Judge to ensure that tainted evidence never see the light of day . . ." (8a).

"To allow public disclosure of potentially tainted evidence, which the trial court has the constitutional obligation to exclude, is to involve the court itself in the illegality. This potential taint of its own process can neither be condoned nor countenanced . . . . At the point where press commentary on those hearings would threaten the impaneling of a constitutionally impartial jury in the county of venue, pretrial evidentiary hearings in this State are presumptively to be closed to the public.

. . .

". . . To safeguard the integrity of its process, the court was required at the outset to distinguish mere curiosity from legitimate public interest.

. . .

". . . Th[e] level of legitimate public concern was not reached in this case. Widespread public awareness kindled by media saturation does not legitimize mere curiosity . . ." (10-11a).

Two judges dissented, concluding that placing the burden of proof upon the press to justify openness of a proceeding would lead to closure in virtually every newsworthy case. Rather, the dissenters would sanction closure only in cases of compelling necessity where other means of preserving a fair trial had been proven ineffective:

> ". . . Mere threatened prejudice cannot be a basis for the court's indulgence in a self-executing order which prevents the free flow of vital information to a willing public when the interests of the defendant in a fair trial, untainted by a juror's knowledge of inadmissible evidence, can be preserved through the traditional means of detecting, identifying and dispelling prejudice through mechanisms which the law has created and which do not impede the flow of information. Unless the party demanding the invocation of the extraordinary practice of excluding the public at large can demonstrate that the effective employment of the time-tested methods-venire, continuance, instructions, admonitions to witnesses, and parties and counsel, sequestration of the jury, or change of venue—would be to no avail in the neutralization of potential sources of prejudice, the courts should not deprive the public of the vital function of the press nor abridge the fundamental interests protected by the First Amendment" (19a) (citations omitted).

Reasons for Granting the Writ

I. Introduction

In *Nebraska Press Assn. v. Stuart,* 427 U.S. 539 (1976), this Court set forth severe strictures against the issuance by trial judges of orders restraining the press from publishing information in its possession.[3] In response to *Ne-*

[3]Doubt has been expressed that such orders can ever be sustained in the criminal trial context. *Id.* at 570 (White, J., concurring); *cf., id.* at 572-73 (Brennan, J., concurring); *id.* at 617 (Stevens, J., concurring).

braska Press, a number of courts have resorted to a different and even more drastic device to limit pre-trial publicity: they have ordered the press, and the general public as well, ejected from courtrooms entirely. In this representative case, a majority of the New York Court of Appeals, specifically relying upon the reservation of the exclusion issue in *Nebraska Press,*[4] has sanctioned holding secret pre-trial proceedings simply at the request of criminal defendants. The decision effectively permits the destruction, based upon plain speculation, of values secured to the press and public both by the First Amendment and the Public Trial clause of the Sixth Amendment.

The confusion evidenced by conflicting lower court decisions concerning the question presented by this case, the fundamental societal interests at stake, the increasing frequency with which exclusionary orders are issued, as well as the plain error in the opinion below, fully warrant review and clarification by this Court.

2. The Interests of the Press and Public

The presence of the press and public at trials serves a vital purpose protected by the First Amendment:

> "Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal

[4] *Id.* at 564 n. 8; *id.* at 576 n. 3, 584 n. 11 (Brennan, J., concurring).

> justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability." *Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 587 (Brennan, J., concurring).

The right of the press and public to attend criminal proceedings is also guaranteed by the Public Trial clause of the Sixth Amendment, and is derived from an abiding distrust of secret tribunals. Public accessibility directly affects the trial process itself, as "an effective restraint on possible abuse of judicial power." *In re Oliver,* 333 U.S. 257, 270 (1948). Beyond the general public, the press has always been regarded as the "handmaiden of effective judicial administration" since it "guards against the miscarriage of justice by subjecting the police, prosecutors and judicial processes to extensive public scrutiny and criticism." *Sheppard v. Maxwell,* 384 U.S. 333, 350 (1966). The significance of the effect of public attendance upon the trial process[5] has led the Court to declare that a trial is a "public event. What transpires in the courtroom is public property . . . ." *Craig v. Harney,* 331 U.S. 367, 374 (1947).

While under certain circumstances the normally coinciding interests of the accused and the public in a public trial may appear to diverge, the seeming conflict does not inherently require that the public interest yield and the courtroom be closed. Closure may mask a collusion among the participants harmful to the defendant, and of which he is personally unaware. Alternatively, a closed

[5] Specific benefits attributed to the public nature of trials include the enhancement of truthful testimony, the recruitment of unknown witnesses, and greater conscientiousness of participants. *United States v. American Radiator & Standard San. Corp.,* 274 F. Supp. 790, 794 (W.D. Pa.), *aff'd* 388 F.2d 201 (3d Cir. 1967), *cert. denied,* 390 U.S. 922 (1968).

proceeding may unduly benefit a criminal defendant to the detriment of the public interest. Thus, "although a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial." *Singer v. United States,* 380 U.S. 24, 35 (1965). The principle is clear that "justice cannot survive behind walls of silence . . ." *Sheppard v. Maxwell, supra,* 384 U.S. at 349.

The dual function of the press in the criminal justice system—"to report fully and accurately the proceedings of government" and "to guarantee the fairness of trials" (*Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 492 [1975]) is in many ways more critical during the pre-trial hearing stage of the criminal process than at the trial on the merits. The overwhelming majority of criminal prosecutions consist solely of "pre-trial" proceedings followed by dismissals or, as here, pleas of guilty.[6] Moreover, the issues pertinent to suppression hearings specifically concern the propriety of the conduct of law enforcement officials,[7] concerning which there is a "paramount public interest in a free flow of information to the people. . . ." *Garrison v. Louisiana,* 379 U.S. 64, 77 (1964).

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[6]For example, in New York City during 1976, 89.7% (17,770) of all dispositions of felony indictments were made prior to trial. In the remainder of New York State, 93.4% (16.676) of such dispositions in 1976 were made prior to trial, and during that some period in Seneca County, *100%* of all felony dispositions (37 indictments) took place without trial. State of New York, *Twenty-Second Annual Report of the Judicial Conference (1977),* 52-55.

[7]A criminal defendant in New York is entitled to a suppression hearing only when he submits affidavits setting forth facts which demonstrate an unlawful search and seizure, unlawful eavesdropping, involuntarily obtained confession, or tainted identification proceeding. N.Y. Crim. Pro. Law §§ 710.20, 710.60.

An order excluding the public and press from a suppression hearing at the request of a criminal defendant thus has profound constitutional significance, since it at once deprives the public and press of their right to a public trial, infringes upon the right to gather news,[8] and restrains the press from observing and commenting upon public institutions. Finally, it interferes with the right of the public to receive information critical to self-governance. *Cf., Va. Pharmacy Bd. v. Va. Consumer Council,* 425 U.S. 748, 757 (1976).

3. The Opinion of the Court Below is Erroneous

The preservation of a defendant's right to an impartial jury is essential, yet the task of the judiciary must be to seek an accommodation when it is suggested that that right is threatened by press commentary, for:

> "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker,* 364 U.S. 479, 488 (1960).

Here, of course, there were available to the trial court a number of measures, short of exclusion, which do not

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[8]*See e.g., Branzburg v. Hayes,* 408 U.S. 665, 681, 707 (1972); *id.* at 727-28 (Stewart, J., dissenting). The issue in this case involves the right of *both* the press *and* public to attend pre-trial evidentiary hearings which are traditionally open to the public in New York State. Hence, there is neither an assertion of an "unrestrained" right to gather information (*cf. Zemel v. Rusk,* 381 U.S. 1, 17 [1951]), nor is there an assertion of a right of access on behalf of the press which exceeds that of the public. *Cf., Pell v. Procunier,* 417 U.S. 817 (1974). Moreover, unlike the prison regulations upheld in *Pell,* the exclusionary orders here were specifically aimed at restricting the reporting of a pre-trial hearing, and effectively foreclosed any observation of that event. *Cf. id.* at 830.

infringe upon the rights of the press and public yet which have repeatedly been recognized by this Court, either alone or in combination, as effective means of eliminating the detrimental impact of pre-trial publicity. *See, e. g., Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 563-65; *Sheppard v. Maxwell, supra,* 384 U.S. at 357-62. Accordingly, this Court has not sanctioned closure of pre-trial proceedings, for it has "been unwilling to place any direct limitations on the freedom traditionally exercised by the news media . . ." (*id.* at 350).

The Court of Appeals, however, did not agree. Disregarding the precept that the:

> "commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government" (*Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. at 492),

it characterized the public interest as "mere curiosity" which had not reached the "level of legitimate public concern." (11a). Further, it repudiated the publicity-mitigating measures which have been endorsed by this Court, on the conclusory basis that "[c]ontinuance, extensive *voir dire* examinations, limiting instructions or venue changes *may* prove paltry protection"[9] (emphasis supplied) (10a) for the rights of a defendant. Thus, by simply brushing aside the importance of open judicial

[9]The Court of Appeals eliminated change of venue as a remedy even though the population of Seneca County was 35,083; that of counties contiguous to Seneca County was 349,324; and that of the Judicial Department in which Seneca County is located was 3,915,433 (*1975 New York Legislative Manual,* 1292-93)—certainly a "substantial pool of prospective jurors" (*Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 563 n. 7) from which an impartial panel could undoubtedly have been selected.

proceedings, the Court of Appeals unnecessarily permitted closure as a remedy of the first instance—to the immediate and certain detriment of the rights of the press and public.

The majority opinion erred further by effectively authorizing closure of pre-trial hearings simply on request in every newsworthy case. As this Court has observed, "pre-trial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial" (*Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 554) and "undifferentiated fear or apprehension" is not sufficient to overcome First Amendment rights (*Tinker v. Des Moines School Dist.,* 393 U.S. 503, 508 [1969]). Yet the Court of Appeals has declared that pre-trial hearings in New York are presumptively to be closed when an impartial jury is merely threatened by press commentary. It is clear that such a threshhold—and hence the presumption—will be established in every case in which the public shows a specific interest.

Moreover, the presumption of closure established by the New York Court is triggered by the publication of news. Thus, reluctant to provoke ejection, the press is "likely to feel some inhibition" at disseminating information concerning trials—an effect equally violative of the First Amendment. *Lamont v. Postmaster General,* 381 U.S. 301, 307 (1965). Somewhat ironically, the ultimate impact of the opinion below will be for the press simply to submit to "gag" orders. By monitoring pre-trial proceedings, albeit mutely, the press will at least be able to observe, in a timely manner, demeanor, inflection and "atmosphere" of the proceeding—all of which are often critical to comprehension of the event, yet incapable of being captured in a sterile transcript. The holding of *Nebraska Press* will indeed be an empty one if it may so readily be circumvented by an unrestricted, albeit creative, interference with access to traditionally public news sources.

Finally, the Court of Appeals, by "presuming" closure, has placed the burden of proof upon the press to justify its presence in the courtroom by demonstrating to the trial court a "legitimate public interest"[10] or an "overwhelming interest in keeping all proceedings open." (11a). Placing the burden on the press is "contrary to where . . . the presumption must lie in the area of First Amendment freedoms." *Estes v. Texas,* 381 U.S. 532, 615 (1965) (Stewart, J., dissenting); *Speiser v. Randall,* 357 U.S. 513, 525-26 (1958). Besides the more obvious financial and logistical considerations in such an allocation, it is one which the press is not in a position to sustain. Non-parties in general have no ready access to information relevant to a proceeding.[11] That principle is particularly true here, where the very purpose of closure is to *maintain* public ignorance of the substance of pre-trial hearings. The dilemma established by the Court of Appeals is apparent and virtually insurmountable.

4. There is a Practical Need for Clarification

The need for this Court to review this limited yet profound issue is emphasized by the clear conflict in appellate opinions both in this case and in others. While the court below has deemed closings to be a remedy of

[10]The Court has doubted the wisdom of "committing . . . to the conscience of judges" decisions as to what are "issues of 'general or public interest' " and which are not. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974).

[11]"The [allocation of the production burden of proof] has primarily a procedural consequence when evidence is available to both parties on the issue in question; it simply determines the order in which they shall put it in. Where, however, no evidence is available to a party on an issue, then the allocation to him of the production burden will mean that he loses upon that issue, and often upon the whole case." F. James, *Civil Procedure,* 254 (1965).

first resort,[12] other courts have held that the availability of a venue change is itself sufficient to defeat every request, based upon the threat of adverse publicity, to close a suppression hearing. *State ex rel. Dayton Newspapers, Inc. v. Phillips,* 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976). Still others have held that the press and public may be excluded from such a proceeding only if the party moving for an order of closure demonstrates a "substantial likelihood" that information prejudicial to the accused will reach potential jurors *and* its detrimental effect "cannot be avoided by alternative means." *Keene Publishing Corp. v. Keene District Court,* ..... N.H. ....., 380 A.2d 261 (1977).[13]

A similar conflict has developed among groups studying the issue. While the court below relied upon an early analysis sanctioning closure essentially on request (ABA Standards, Fair Trial and Free Press § 3.1 [1968]), the ABA Adjunct Committee on Fair Trial/Free Press has, since the decision in *Nebraska Press,* developed a standard which successfully accommodates the rights of the

[12]*See, also, Philadelphia Newspapers Inc. v. Jerome,* ..... U.S. ..... (No. 77-308 January 9, 1978) (statute permitting closure of suppression hearing on request); *cf., United States v. Gurney,* 558 F.2d 1202, 1211 (5th Cir. 1977), *petition for cert. filed sub nom. Miami Herald Publishing Company v. Krentzman,* 46 U.S. L.W. 3471 (U.S. January 16, 1978) (No. 77-1010).

[13]*See, also, United States v. Cianfrani,* Crim. No. 77-142 (E.D. Pa., November 16, 1977) (Becker, J.) (presumption of media access to suppression hearing can be overcome if standards of *Nebraska Press* are met); *State v. Allen,* 73 N.J. 132, 373 A.2d 377 (1977) (closure arguably is a prior restraint and hearing may be held in camera only if "serious and imminent threat to the integrity of the trial" is demonstrated and alternatives are shown to be not "feasible or proper") (dictum); *State ex rel. Gore Newspaper Company v. Tyson,* 313 So. 2d 777 (Fla. App. 1975), *rev'd on other grounds, English v. McCrary,* 348 So. 2d 293 (Fla. 1977).

press and public with those of a defendant.[14] ABA Adjunct Committee on Fair Trial/Free Press, *Standards Relating to Fair Trial and Free Press* §3.2 (Approved Draft, February, 1978); *see, also,* Staff of Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess., Report on Free Press—Fair Trial, 21-22 (Comm. Print 1976).

Finally, even if it can be assumed that a decision of New York's highest court will not be followed in other jurisdictions, the impact of the Court of Appeals opinion will be striking.[15] The circulation of the 78 daily newspapers in New York State approaches 7,000,000, larger than in any other state and almost 11.5% of the daily circulation nationwide. There are, moreover, 404 weekly newspapers in New York,[16] which the decision below will perhaps most dramatically affect, since it is unlikely that they will be able to expend the resources required to assert their interest in opposition to closure. *Cf., Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 610 n. 40 (Brennan, J., concurring). The nature and extent of the injury potentially to be inflicted by the opinion below, unless corrected, is thus enormous.

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[14]"Except as provided below, the pre-trial hearing and its record shall be open to the public including representatives of the news media. . . . The presiding officer may close a . . . pre-trial hearing . . . only if: (1) the dissemination of information from the pre-trial hearing and its record would create a clear and present danger to the fairness of a trial; and (2) the prejudicial effect of such information on potential jurors cannot be avoided by alternative means [including]: (a) voluntary agreement with representatives of the news media; (b) continuance; (c) severance; (d) change of venue; (e) change of venire; (f) *voir dire*; (g) additional peremptory challenges; (h) sequestration of the jury; and (i) admonition to the jury."

[15]See *supra,* n. 6.

[16]Editor & Publisher Co., Inc., *1977 International Yearbook,* 21, 285-87 (1977).

5. The Procedure Under Which the Orders Were Issued is Improper

Exclusionary orders were issued by the trial court without advance warning, and the hearing concluded before attorneys for the press could be heard in opposition. The appellate courts below agreed that a hearing in such situations should be afforded (11a, 27a), but due process requires more.

Adequate notice of an impending exclusion and an opportunity to be heard are necessary. *Carroll v. Princess Anne,* 393 U.S. 175 (1968). Particular findings of fact, based upon evidence adduced at the hearing, must be made which support the order and which demonstrate why alternative measures, less drastic than closure of a courtroom, would not cure the perceived injury. *Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 563. Finally, such orders should be stayed, if at all possible, pending an opportunity to seek expedited appellate review. *Cf., National Socialist Party v. Skokie,* 432 U.S. 43, 44 (1977); Note, *Ungagging the Press: Expedited Relief From Prior Restraints on News Coverage of Criminal Proceedings,* 65 Georgetown L.J. 81 (1976).

6. The Case is Not Moot

Following the suppression hearing, but prior to the decision of the Appellate Division, the defendants pleaded guilty and the transcript of the suppression hearing was released (5a). Although the Court of Appeals ultimately dismissed the proceeding as technically moot (12a), it nevertheless retained jurisdiction to decide the merits of "far from an ordinary appeal [which] crystallizes a recurring and delicate issue of concrete significance both to

the courts and the news media" and which concerns matters that "typically evade review" (5a).[17]

For the reasons set forth by the Court of Appeals, and for those articulated in *Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 546-47, the case is not moot and should be resolved by the Court.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the State of New York Court of Appeals.

Respectfully submitted,

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March 15, 1978

[17]The Court is not bound by the mootness determination of the Court of Appeals. *Liner v. Jafco, Inc.*, 375 U.S. 301 304 (1964).

Certificate of Service

I hereby certify that on this 16th day of March, 1978, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Bernard Kobroff, Esq., c/o State of New York, Bureau of Prosecution and Defense Services, Division of Criminal Justice Services, 80 Centre Street, New York, New York 10013, Counsel for Respondents. I further certify that all parties required to be served have been served.

/s/ ROBERT C. BERNIUS
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Rochester, New York 14603
Attorney for Petitioner

APPENDIX

Order of State of New York Court of Appeals Denying Motion for Reargument, Entered January 12, 1978

STATE OF NEW YORK

COURT OF APPEALS

January 12, 1978

Mo. No. 22

IN THE MATTER

OF

GANNETT CO., INC.,

Respondent,

vs.

HON. DANIEL A. DEPASQUALE, as Judge of the Seneca County Court, KYLE EDWIN GREATHOUSE, DAVID RAY JONES and WALTER J. WARD, as District Attorney of Seneca County,

Appellants.

Motion for reargument denied.

Gabrielli, J., taking no part.

Opinion and Judgment of State of New York Court of Appeals, Entered December 19, 1977

IN THE MATTER

OF

GANNETT CO., INC.,

Respondent,

v

DANIEL A. DEPASQUALE, as Judge of the Seneca County Court, *et al.*,

Appellants.

Argued October 12, 1977; decided December 19, 1977

OPINION OF THE COURT

WACHTLER, J.

[374] During the course of pretrial suppression hearings in a highly publicized murder case, the court directed that the evidentiary proceedings be closed to the public, including the press. The closure order was imposed as a means to ensure the defendants' right to a fair trial by forestalling the prejudicial effects of further notoriety. In this article 78 proceeding in the nature of prohibition, the petitioner, a disseminator of news through press and television, claims that the court's action violated First Amendment guarantees and the Sixth Amendment right to a public trial. In what is hardly a novel conflict, its claim presents an open issue within the "free press—fair trial" controversy (see *Matter of Oliver v Postel,* 30

NY2d 171, 183; *Matter of United Press Assns. v Valente,* 308 NY 71, 85; cf. *Nebraska Press Assn. v Stuart,* 427 US 539, 564, n 8).

This claim to unrestricted media access to criminal proceedings of public interest stems from an unusual matter locally known as "the Clapp murder case". Wayne Clapp was a former town policeman. He had lived his entire 42 years in the Rochester area and had developed deep ties in the surrounding rural communities. On July 19, 1976, he was reported missing.

According to reports in the news media, including the petitioner's two daily papers and Rochester television station, Clapp had last been seen leaving Roy's Marina accompanied by two unidentified youths. His boat had later been returned, laced with bullet holes. But his pickup truck and .357 magnum revolver, along with the two strangers, had vanished. Divers began searching Seneca Lake for Clapp's remains. The body of the deceased, however, was never recovered.

On July 22, the media announced that a nationwide police alert for Clapp's truck had proved successful. Michigan police had spotted the vehicle and, after a three-hour chase requiring helicopters and tracking dogs, they arrested a 16-year-old Texas youth, Kyle Greathouse, and his 21-year-old traveling companion, David Jones. The next day, front page articles revealed that Greathouse, apparently acquiescing to police requests, had led Michigan authorities to the location where he had buried the stolen revolver. The press later reported, without expanding, that the suspects had made admissions or [375] confessions before waiving extradition proceedings and being returned to New York.

A Seneca County Grand Jury returned a lengthy indictment charging the two youths with second degree murder and robbery. On August 6, petitioner's morning daily reported that the accused "pleaded innocent yesterday • • • at their arraignment before Seneca County Court Judge

Daniel De Pasquale. 'Not guilty, your honor,' the 16-year-old Greathouse answered * * * Jones gave the same response."

At the commencement of a pretrial suppression hearing, defense attorneys argued that an unabated buildup of adverse publicity had already jeopardized their clients' ability to receive a fair trial. To minimize the prejudicial effects of further disclosures, they asked that the pretrial proceedings be held *in camera*. The District Attorney had no objections. In an oral ruling, the court concluded that "these matters are in the nature of a Huntley hearing and suppression of physical evidence, and it is not the trial * * * Certain evidentiary matters may come up in the testimony of the People's witnesses that may be prejudicial to the defendants, and for those reasons the court is going to grant both [defendants'] motions." The public, including the petitioner's staff reporter, were removed from the courtroom. The suppression hearing then commenced and continued *in camera* to its conclusion the next day.

Three days later, counsel for Gannett appeared and asked the County Court to reconsider and vacate its ruling *nunc pro tunc*. Since the proceedings had already been concluded, a copy of the hearing transcript was also requested. While finding this intervention untimely, the court accommodated the asserted public interest. It signed Gannett's show cause order directing both the defense and the People to justify withholding the transcripts. The issues were fully briefed, and on November 16, the merits were argued. But the advantages of hindsight and further debate only reinforced the court's initial determination that open suppression hearings, if exposed to notoriety, would have deprived Greathouse and Jones of any meaningful opportunity to receive a fair trial. The court's original finding of "a reasonable probability of prejudice to the defendants" not only justified closure in the first instance but, in the Trial Judge's view, applied with equal force to the request for transcripts as well.

The Appellate Division disagreed and, while trial in the [376] criminal proceeding was still pending, granted the petitioner's renewed request for access to the sealed records. Its *Per Curiam* decision, while purporting to resolve what had already become an academic dispute,[1] has nonetheless provided a conduit through which critical aspects of the "free press—fair trial" controversy have been presented for review.

We would ordinarily decline the invitation and dismiss the appeal, taken by the respondents in the article 78 proceeding, for mootness. But this is far from an ordinary appeal. It crystallizes a recurring and delicate issue of concrete significance both to the courts and the news media. And in its broadest implications, it presents a challenge to a fundamental precept of judicial administration—the courts' inherent power to control their own process. For these reasons, combined with the fact that matters of this character typically evade review, we have retained jurisdiction to entertain the appeal (see *Matter of Oliver v Postel*, 30 NY2d 171, 178, *supra; Matter of United Press Assns. v Valente*, 308 NY 71, 76, *supra;* cf. *East Meadow Community Concerts Assn. v Board of Educ.*, 18 NY2d 129, 135; *Matter of Rosenbluth v Finkelstein*, 300 NY 402, 404; see, generally, Cohen and Karger, Powers of the New York Court of Appeals, pp 420-421).

Criminal trials are presumptively open to the public, including the press. Public access is secured through a fundamental concept said to be rooted in distrust for secret tribunals—the inquisition, star chamber and *lettre de cachet* (*Matter of Oliver*, 333 US 257, 268-270). It is typically the defendant, however, who reminds us on appeal from cases of compelled closure that the right to a public trial is a

[1]The transcripts had already been offered for the petitioner's use. The need for sealing them had disappeared after co-defendants Greathouse and Jones, in satisfaction of the indictment pending against them, pleaded guilty to lesser included crimes.

constitutional guarantee which "the accused shall enjoy" (US Const, 6th Amdt; Civil Rights Law, § 12; former Code Crim Pro, § 8; see, e.g., *People v Hinton,* 31 NY2d 71, cert den 410 US 911). It is after all the defendant whose right to a "fair trial in a fair tribunal" (*Matter of Murchison,* 349 US 133, 136; *People v McLaughlin,* 150 NY 365, 375) and whose very liberty is in jeopardy. And because it is the defendant who suffers directly when wrongfully deprived of public vigilance against possibly unjust prosecution or potential abuse (or nonuse) of judicial discretion, the right to insist on a public trial is primarily that [377] of the accused (*Matter of Oliver, supra,* at pp 268-271; *United States v Sorrentino,* 175 F2d 721, 722-723; compare *People v Jelke,* 308 NY 56, with *Matter of United Press Assns. v Valente,* 308 NY 71, 80-81, *supra*).

In practice, this priority need not detract from the public's general interest in the assurance of fair as well as effective enforcement of its laws. Though somewhat attenuated in comparison with a defendant's self-interest, each of us shares a stake in an adversary system which consistently dispenses our penal laws impartially (US Const, 5th, 6th, 14th Amdts; NY Const, art I, §§ 2, 6), free from needless prejudicial publicity (see, e.g., *Sheppard v. Maxwell,* 384 US 333). Ordinarily, public trials "serve to instill a sense of public trust in our judicial process" (*People v. Hinton, supra,* at p 73). But this assumes that public access in a given case poses "no threat or menace to the integrity of the trial" (*Craig v Harney,* 331 US 367, 377). Because this assumption sometimes fails, neither the public nor the press has an absolute right to attend all stages of all criminal trials (e.g., *Estes v Texas,* 381 US 532, 538; *Matter of United Press Assns. v Valente, supra,* at p 81). Particularly where a fair trial may hang suspended in the balances, the Constitution should not be considered as a substitute for a sunshine law (see Public Officers Law, §§ 85-89, as amd by L 1977, ch 933; Freedom of Information Act, US Code, tit 5, §552).

The public's right to demand access to criminal trials, let alone suppression hearings, was never intended to comprehend outside interference with orderly judicial process. The public trial concept has therefore "never been viewed as imposing a rigid, inflexible straitjacket on the courts. It has uniformly been held to be subject to the inherent power of the court to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and generally to further the administration of justice" (*People v Jelke, supra,* at p 63; accord *United States ex rel. Lloyd v Vincent,* 520 F2d 1272, 1274, cert den 423 US 937). To this end, the inherent power to limit public access has become a common and integral aspect of due process in trials for particularly sensitive crimes (Judiciary Law, § 4) or, for instance, where closure is necessary to protect a witness' identity (*People v Hinton,* 31 NY2d 71, 73, *supra*), or life (*People v Hagan,* 24 NY2d 395, cert den 396 US 886) or delicate emotional state (*People v Smallwood,* 31 NY2d 750; *United States ex rel. Smallwood v* [378] *La Valle,* 377 F Supp 1148, affd 508 F2d 837, cert den 421 US 920).[2] Of course, the policies underpinning closure in these matters dictates the sealing of documents and transcripts as well (e.g., Domestic Relations Law, §235). And in all of these cases, the remedy—legislative or judicial—has called for "a sensitive and wise balancing of the rights of the individual defendant and the interests of the public" (*People v Darden,* 34 NY2d 177, 181-182).

In other words, we encourage accountability through public legal proceedings and the truthful reporting of whatever transpires in open court (see Civil Rights Law, §74),

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[2]Secrecy is also the rule in Grand Jury hearings for felony cases (CPL 190.25; see *People v Miller,* 257 NY 54), professional disciplinary investigations and proceedings (Judiciary Law, § 90; see *Matter of Nichols v Gamso,* 35 NY2d 35), matrimonial actions (*Shiles v News Syndicate Co.,* 27 NY2d 9; *Danziger v Hearst Corp.,* 304 NY 244) and Family Court proceedings (e.g., Family Ct Act, §1043; 22 NYCRR 2830.8).

but "[only] so far as that object can be attained without injustice to the persons immediately concerned" (*Estes v Texas, supra,* at p 542, quoting 2 Cooley's Constitutional Limitations, p 931 [Carrington ed, 1927]). Having imposed on the Trial Judge an affirmative obligation to ensure this balance (*Sheppard v Maxwell, supra,* at pp 352-363; *Irvin v Dowd,* 366 US 717), it would be anomalous indeed to withhold the discretionary power necessary to achieve it.

In the case now before us, the Trial Judge was not presiding over a trial on the merits. His concern was with a suppression hearing which, of course, is "not within the specific meaning of 'trial'" (*People v Anderson,* 16 NY2d 282, 288; see *Maurer v People,* 43 NY 1, 3; *Hopt v Utah,* 110 US 574). The court at this stage was not yet forced to insulate an already impaneled jury from extrinsic and inadmissible evidence of guilt (see *Murphy v Florida,* 421 US 794; *Gonzales v Beto,* 405 US 1052; *Parker v Gladden,* 385 US 363; *Jenkins v United States,* 380 US 445). Its task instead was to ensure that further pretrial publicity would not impermissibly alter a defendant's status in the public eye from that of a suspected killer to that of a confessed murderer.

Before any challenged evidence could be submitted to a jury, due process required the Trial Judge to fully and independently resolve, as a matter of law, that the evidence was not obtained in violation of the fundamental constitutional rights of the accused (e.g., *Miranda v Arizona,* 384 US 436, 467; *Jackson v Denno,* 378 US 368, 394; *Mapp v Ohio,* 367 US [379] 643; *People v Huntley;* 15 NY2d 72, 78). Knowing how damaging the introduction of this evidence could be to a defendant, and that widespread knowledge even of inadmissible evidence could nonetheless predetermine guilt (e.g., *Sheppard v Maxwell,* 384 US 333, *supra*), we require the Trial Judge to ensure that tainted evidence never see the light of day (CPL 710). Suppressed evidence should not be used to determine a defendant's

guilt, not at trial and certainly not before trial through publication of illegally obtained evidence by the media, whose credibility is the envy of many institutions (see *United States v Nixon,* 418 US 683, 714). At their option, the defendants could have later challenged before a jury the voluntariness of their confessions. But this choice is for the accused, not the press.

Defendants Greathouse and Jones sought to invoke these constitutional norms, not by excluding the public or the press from a highly sensationalized murder trial, but rather by excluding allegedly tainted evidence of guilt. The petitioner nonetheless urges us to rule that the trial court's protective order, however well intentioned, was a nullity in the face of the media's superior right to be free from prior restraint on publication (US Const, 1st Amdt; NY Const, art I, § 8).

To be sure, when a restraint is imposed to prevent commentary on known facts about a pending criminal case, tensions between First and Sixth Amendment rights are greatest. The Supreme Court in *Nebraska Press Assn. v Stuart* (427 US 539, 570, *supra*) agreed that "the barriers to prior restraint remain high". In that case, a "gag order" modified by the Nebraska Supreme Court prohibited the press from reporting or commenting on judicial proceedings which had been held in open court. Reporters had attended the "public event"; they had seen and heard what transpired. To prevent dissemination of that highly prejudicial information, the State court purported to restrain all news reports of "confessions or admissions • • • and other information strongly implicative of the accused as the perpetrator of the slayings" (*State v Simants,* 194 Neb 783, 801). Because "[t]hose who see and hear what transpired can report it with impunity" (*Craig v Harney,* 331 US 367, 374, *supra;* see *Oklahoma Pub. Co. v District Ct.,* 430 US 308, 311; *Nebraska Press Assn. v Stuart, supra,* at p 568; *Sheppard v Maxwell, supra,* at pp 362-363), the restrictive order

was subject to a "heavy presumption against" prior restraint and was ultimately condem[380]ned as "clearly invalid" (*Nebraska Press Assn. v Stuart, supra,* at p 570).

This, of course, does not mean that trial courts are left powerless to stem improper revelation of facts that would present an imminent threat to the impaneling of a constitutionally impartial jury. In fact, as an additional alternative to a trial court's "benign neglect" outlined in *Sheppard v Maxwell* (*supra,* at pp 357-362), the majority in *Nebraska Press* left open the prophylactic adopted in the case at bar—"[c]losing of pretrial proceedings with the consent of the defendant" (*Nebraska Press Assn. v Stuart, supra,* at p 564, n 8; see p 576, n 3; p 584, n 11 [BRENNAN, J., concurring]). Continuance, extensive *voir dire* examinations, limiting instructions or venue changes may prove paltry protection for precious rights (see, e.g., Jury System in America [Simon ed, 1975]). Reversals and new trials are hardly acceptable alternatives. The extent of the media's right to access should not remain unresolved, for it places in issue the very integrity of our courts.

To allow public disclosure of potentially tainted evidence, which the trial court has the constitutional obligation to exclude, is to involve the court itself in the illegality. This potential taint of its own process can neither be condoned nor countenanced. To avoid becoming a link in the chain of prejudicial disclosures, trial courts have the power to exclude the public from pretrial suppression hearings (see ABA Standards Relating to the Administration of Criminal Justice, Pretrial Hearings, § 3.1, p 203 [1974]). At the point where press commentary on those hearings would threaten the impaneling of a constitutionally impartial jury in the county of venue, pretrial evidentiary hearings in this State are presumptively to be closed to the public.

As the locus of public interest, this determination is to rest with the hearing Judge. Of primary consideration is

the public's interest in avoiding any developments that would threaten to truncate a defendant's right to a fair trial. This concept is premised on the right to an impartial jury as the arbiter of guilt or innocence. To maintain that right, the hearing Judge must have the means to ensure that prospective veniremen do not hear matters from which, by law, they should be insulated.

This was precisely the problem confronting the hearing Judge in the case at bar. The public knew that co-defendants [381] Greathouse and Jones had been caught "red-handed" by Michigan police with fruits of the crime. And it was widely known that the defendants had made incriminating statements before being returned to this State. The details, however, were not known, and public curiosity was intense. To safeguard the integrity of its process, the court was required at the outset to distinguish mere curiosity from legitimate public interest.

In so doing, the courts should of course afford interested members of the news media an opportunity to be heard, not in the context of a full evidentiary hearing, but in a preliminary proceeding adequate to determine the magnitude of any genuine public interest. This may be found to outweigh the risks of premature disclosures. In trials involving public officials, for instance, the public may have an overwhelming interest in keeping all proceedings open.[3]

That level of legitimate public concern was not reached in this case. Widespread public awareness kindled by media saturation does not legitimize mere curiosity. Here the public's concern was not focused on prosecutorial or judicial accountability; irregularities, if any, had occurred

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[3]Whereas the obligation of nondisclosure in pretrial hearings is for the purpose of insulating prospective veniremen, in certain other situations, such as those involving the identification of an informer, total preclusion from any public knowledge may be called for (cf. *People v Darden*, 34 NY2d 177, *supra; People v Goggins*, 34 NY2d 163).

out of State. The interest of the public was chiefly one of active curiosity with respect to a notorious local happening. While the defendants were still in jeopardy, any true public interest could be fully satisfied, consonant with constitutional free press guarantees, by affording the media access to transcripts redacted to exclude matters ruled inadmissible during the closed suppression hearing (cf. *Department of Air Force v Rose*, 425 US 352, 370-382). Complete transcripts were made available when the defendants' interests were not longer in jeopardy. The public's "right to know" was then compatible with the defendants' right to a fair trial.

This conclusion would ordinarily lead to a reversal inasmuch as the Appellate Division had directed full pretrial disclosure. As noted, however, since the questions presented by this appeal became moot when the pleas were entered, and the relief requested would now serve no purpose, the judgment appealed from should be modified, without costs, to the extent of dismissing the petition solely for that reason.

[382] Cooke, J. (dissenting). I dissent and vote to affirm the judgment of the Appellate Division.

While court closures may be employed at times for narrowly circumscribed purposes, in this instance invocation of this drastic remedy, without notice, without a hearing, and without substantiation of a clear and present State necessity, abridged the rights of the press to report true accounts of public proceedings and deprived the public of a free flow of information in which they have a great interest. In the absence of compelling necessity, public scrutiny of the administration of justice and the effectiveness of law enforcement agencies cannot be foreclosed.

Petitioner corporation owns and operates two dailies and a television station in the Greater Rochester area. With public attention focused upon the suspicious circumstances surrounding the mysterious disappearance of

former Brighton, New York, policeman Wayne Clapp in July, 1976 and the subsequent apprehension and extradition of his alleged slayers, 21-year-old David R. Jones and his 16-year-old companion, Kyle E. Greathouse, in the State of Michigan six days later, petitioner's newspapers and television studios devoted a great deal of time, manpower and resources to report the investigation of the case and the pretrial proceedings. The notoriety of the crime was heightened by the failure of the police to recover Wayne Clapp's body from Seneca Lake where, allegedly, it had been dumped after the murder.

When, however, petitioner's reporter Carol Ritter appeared to observe the suppression hearing on November 4, 1976, both defendants, without prior notice, joined in an oral motion to exclude the press and public from the courtroom. Without insisting upon notice to the press and without directing a hearing on the application, the County Court summarily granted the application. "The Court: [S]ince these matters are in the nature of a Huntley hearing and suppression of physical evidence, and it is not the trial of the matter * * * [c]ertain evidentiary matters may come up in the testimony of the People's witnesses that may be prejudicial to the defendant".

On advice of counsel, petitioner's reporter requested in writing a postponement of the suppression hearing in order to afford the news media's attorneys an opportunity to appear and prepare argument against the order of closure. Upon denial, petitioner moved by order to show cause, dated Novem[383]ber 8, 1976, to vacate the closure order so that petitioner's employees could gain access to the transcripts of the hearing. Although the court conceded, at argument on the motion, that it was regrettable that counsel for the petitioner had not been in court when the motion for closure was made, the court denied the application and adhered to its prior order. In rejecting petitioner's contention that the effect of the order was to deprive the press of its First Amendment function, the

court reasoned that the case was unique, that a reasonable probability of prejudice was a consequence of the publication of the happening of the suppression hearing, and that the defendants, as movants for an order of closure, did not bear the burden of establishing prejudice.

Thereafter, petitioner commenced this article 78 proceeding in the Appellate Division, Fourth Department, to prohibit enforcement of County Court's order. The Fourth Department unanimously sustained the petition, vacated the order of closure and enjoined its enforcement, holding: "The exclusionary order entered by the County Court is not supported by a showing of compelling factual circumstances. * * * No finding was made concerning the extent of pretrial coverage in the case, the impact which the disclosures would be expected to produce, the size of the prospective jury pool in Seneca County nor as to any other matter that would indicate with a reasonable amount of certainty that the defendants could not receive a fair trial in Seneca County without a closed *Huntley* hearing. The closure order entered here lacks the requisite factual basis necessary to overcome the right of the public and press to open judicial proceedings" (55 AD2d 107, 110).

On appeal to this court, appellants urge that there exists a fundamental distinction between the prohibited blanket "gag" order (see *Nebraska Press Assn. v Stuart,* 427 US 539) and a direction to close the courtroom doors. Unlike the "gag" order which bars the press from reporting matter which is otherwise open to the public, the closure order merely regulates access to information and does not prohibit dissemination of any news. The government, appellants maintain, may have no right to interpose a prior restraint on publication, but it certainly has no duty to supply the press with access to information. Further, it is urged that courts have inherent power to preserve order and decorum and to protect the rights of parties and witnesses.

To be sure, the trial court has a wide range of powers at its [384] disposal to assure a fair trial to the parties affected, but the power to isolate judicial proceedings from the scrutiny of the public, absent compelling State necessity, is not numbered among them. "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions * * * are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government" (*Cox Broadcasting Corp. v Cohn,* 420 US 469, 492; *Estes v Texas,* 381 US 532, 541-542). In light of *Nebraska Press,* this court can hardly deny the media's right and obligation to report on the function of judicial tribunals. By the same token, the premise that there is any significant difference in denying access to information about a matter of public interest—upon undocumented, unproven, and conclusory allegations of possible prejudice—assumes that the right to observe an otherwise public proceeding is severable from and of less value than the right to convey information about it. Any such distinction is without substance, since the right of free expression must encompass both the freedom to *convey* information about a public matter and the liberty to gain *access* to proceedings involving the same. A closed proceeding should be recognized for what it is—a "serious backdoor threat to First Amendment interests" (Staff of Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th Cong, 2d Sess, Free Press—Fair Trial [1976]).

This court's recognition of an exclusion order as a general prophylactic against the influence of unknown and undocumented prejudices upon the tribunal's deliberative function suggests an almost casual acceptance of a prior burden on the freedom of the press, a burden presumptively repugnant to the ends of the First Amendment (see *Bantam Books v Sullivan,* 372 US 58, 70). The effectiveness of such an order cannot be seriously doubted,

but the right to report the news is too vital to the nature of a free State to allow the press to be stifled under the pressure of direct "gag" orders, or even more subtle means of accomplishing the same illicit end (*Near v Minnesota ex rel. Olson,* 283 US 697, 713-714): "[*S*]*peech concerning public affairs* is more than self-expression; it *is the essence of self-government.* The First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, [385] caustic, and sometimes unpleasantly sharp attacks on government and public officials.' *New York Times Co. v Sullivan,* 376 U.S. [254], at 270." (*Garrison v Louisiana,* 379 US 64, 74-75 [emphasis added].) Absent compelling and overriding State necessity, the right of the public to gain information about public matters may not be infringed (*Schenck v United States,* 249 US 47, 52; *Brandenburg v Ohio,* 395 US 444).

The necessity for public inspection is not diminished because the proceeding is a pretrial hearing to suppress evidence illegally obtained. Suspicion enshrouds whatever determination is not freely aired in a forum open to public inspection, scrutiny and, sometimes, even scorn. The public has the right to know that the Constitution protects equally each person accused of a crime, and has the right to scrutinize the effectiveness of police agencies in coping with criminal activity. "[T]he testimony of police officers regarding police conduct which usually occurs more or less in private within an environment which the police themselves create and in which they reign, should not be given in secret" (*United States ex rel. Bennett v Rundle,* 419 F2d 599, 606).

At times, the public interest may command otherwise. Thus, it has been held that necessity demands that the doors of the courtroom be closed for the protection of

undercover agents (*People v Hinton,* 31 NY2d 71, 74; *People v Hagan,* 24 NY2d 395; *People v Garcia,* 51 AD2d 329, affd 41 NY2d 861; *United States ex rel. Lloyd v Vincent,* 520 F2d 1272, 1274, cert den 423 US 937), for the protection of witnesses who might be unduly inhibited from or embarrassed by relating the substance of their testimony in front of an audience (*People v Jelke,* 308 NY 56, 63; *People v Hall,* 51 App Div 57; Cook, Constitutional Rights of the Accused: Trial Rights, § 101), and for the preservation of public sensibilities (*Matter of Oliver v Postel,* 30 NY2d 171, 179; *Matter of United Press Assns. v Valente,* 308 NY 71; *People v Jelke, supra;* see, also, *People v Nicholas,* 35 AD2d 18). However, under these circumstances, closure does not contemplate the isolation of the tribunal from its milieu to diminish the possible effects of feedback from the community upon the ultimate disposition. Rather, it seeks to protect the actors in the controversy from personal repercussions which the law deems serious enough to warrant extraordinary precaution or, in the case of matter offensive to public sensibility, to preclude dissemination under a judicial aegis of unlawful material in which, *ab initio,* the general public has [386] no legitimate interest. Nevertheless, "any claim of practical justification for a departure from the constitutional requirement of a public trial must be tested by a standard of strict and inescapable necessity" (*United States ex rel. Bennett v Rundle,* 419 F2d 599, 607, *supra; United States ex rel. Lloyd v Vincent,* 520 F2d 1272, 1274, cert den 423 US 937, *supra; People v Devine,* 80 Misc 2d 641, 644).

The guidelines expressed by the majority signal the common, if not certain, locking of the courtroom door virtually whenever requested in pretrial hearings. To allow closure on the mere showing that press commentary would "threaten" the impaneling of an impartial jury (p 380) affords almost no protection to First Amendment

rights for the simple reason that in cases of notoriety it will always be possible to show some risk of prejudice. Of greater concern, however, is that the majority has turned the burden of proof around. In *Nebraska Press Assn. v Stuart* (427 US 539, *supra*), the Supreme Court commented that "[t]he record demonstrates, as the Nebraska courts held, that there was *indeed a risk* that pretrial news accounts, true or false, would have some *adverse impact* on the attitudes of those who might be called as jurors" (427 US, at pp 568-569 [emphasis added]). Nevertheless, the court concluded that a sufficient showing had not been made that "alternatives to a prior restraint on petitioners would not have sufficiently mitigated the adverse effects of pretrial publicity so as to make prior restraint unnecessary" (at p 569). In so determining, however, the court reasoned that "our conclusion is not simply a result of assessing the adequacy of the showing made in this case; it results in part from the problems inherent in meeting the heavy burden of demonstrating, in advance of trial, that without prior restraint a fair trial will be denied" (at p 569). In contrast, the majority here instead of demanding a heavy burden of showing that alternatives to closure cannot insure a fair trial, requires a determination of the "magnitude of any genuine public interest" (p 381). This presumes that the press should be excluded and discourages use of alternatives to closing the courtroom. In effect, this procedure suggests that any pretrial publicity automatically produces an unfair trial—a proposition expressly rejected by the Supreme Court (see 427 US, at p 565).

By acceding to defendants' motion for closure in this instance, the County Court exceeded its very limited power to exclude the press and public and overlooked a clear command [387] to preserve the right to a fair trial at a less drastic cost than shutting off channels of legitimate public information. Although the right of the defendant to a jury unbiased by the determination at the *Huntley*

hearing has been repeatedly recognized in the courts (e. g., *Lego v Twomey,* 404 US 477, 483-486; *Pinto v Pierce,* 389 US 31; *Jackson v Denno,* 378 US 368; *People v Huntley,* 15 NY2d 72; *People v Hulett,* 28 AD2d 624, affd 22 NY2d 696, cert den 393 US 1097; *People v Brainard,* 56 AD2d 633; *People v Higgins,* 28 AD2d 1016; *People v Cornell,* 28 AD2d 1166; *People v Pratt,* 27 AD2d 199) here County Court dictated a draconian measure without proof of abject necessity. Before resorting to this ultimate restriction, the trial court was obliged to exercise "ability and ingenuity * * * to devise appropriate steps, *within constitutional limits,* to protect a defendant in his right to a fair trial" (*Matter of New York Times Co. v Starkey,* 51 AD2d 60, 66 [concurring opn, SHAPIRO, J.; emphasis added]; see, also, *Matter of Hearst Corp. v Cholakis,* 54 AD2d 592, 593). Mere threatened prejudice cannot be a basis for the court's indulgence in a self-executing order which prevents the free flow of vital information to a willing public when the interests of the defendant in a fair trial, untainted by a juror's knowledge of inadmissible evidence, can be preserved through the traditional means of detecting, identifying and dispelling prejudice through mechanisms which the law has created and which do not impede the flow of information. Unless the party demanding the invocation of the extraordinary practice of excluding the public at large can demonstrate that the effective employment of the time-tested methods—venire, continuance, instructions, admonitions to witnesses, and parties and counsel, sequestration of the jury, or change of venue—would be to no avail in the neutralization of potential sources of prejudice, the courts should not deprive the public of the vital function of the press nor abridge the fundamental interests protected by the First Amendment (*Nebraska Press Assn. v Stuart,* 427 US 539, 569, *supra;* see, also, concurring

opn of Mr. Justice POWELL, at p 571; *Branzburg v Hayes*, 408 US 665, 685; *Sheppard v Maxwell*, 384 US 333, 362-363).

It is no answer to suggest that the right to a public trial is waivable at the option of the accused. As the right of a public trial knows no correlative right to a private one (see *Singer v United States*, 380 US 24, 34-35; Cook, Constitutional Rights of the Accused: Trial Rights, § 103), such a waiver cannot [388] automatically close the court. "A trial is a public event. What transpires in the court room is public property • • • There is no special perquisite of the judiciary which enables it • • • to suppress, edit, or censor events which transpire • • • before it" (*Craig v Harney*, 331 US 367, 374).

Accordingly, the judgment of the Appellate Division should be affirmed.

Chief Judge BREITEL and Judges JASEN and JONES concur with Judge WACHTLER; Judge COOKE dissents and votes to affirm in a separate opinion in which Judge FUCHSBERG concurs; Judge GABRIELLI taking no part.

Judgment modified, without costs, in accordance with the opinion herein and, as so modified, affirmed.

Opinion of State of New York, Supreme Court, Appellate Division—Fourth Department Entered December 17, 1976

IN THE MATTER

OF

GANNETT CO., INC.,

Petitioner,

v

DANIEL A. DEPASQUALE, as Judge of the Seneca County Court, *et al.*,

Respondents.

Per Curiam. Petitioner Gannett Co., Inc. seeks an order of prohibition pursuant to CPLR article 78 vacating and prohibiting enforcement of two orders of the Seneca County Court which excluded the public and press from a pretrial *Huntley* [108] hearing in a criminal prosecution involving two defendants charged with murder.

Petitioner owns and operates two daily newspapers and one television station in the Rochester area. In the course of its news reporting activities petitioner assigns reporters to cover criminal proceedings that are expected to generate interest among the general public. People v Kyle Edwin Greathouse and Davis [*sic*] Ray Jones is one such proceeding currently in the pretrial stage in Seneca County. Defendants Greathouse and Jones were indicted for the crimes of murder, robbery and larceny. It was alleged in the indictment that Greathouse and Jones robbed and murdered a fishing companion and dumped the victim's body into Seneca Lake. Thereafter the defendants fled the jurisdiction and were eventually arrested in Michigan. Sub-

sequently they were returned to New York to face criminal charges. The case against the defendants is somewhat unique in that the alleged victim's body had not been recovered when the indictments were returned, and the record indicates that the corpus of the alleged victim is still missing. Another unusual circumstance is that one of the defendants is 16 years old.

The defendants subsequently filed a motion pursuant to CPL article 710 to suppress certain statements attributed to them. The *Huntley* hearing was conducted before Honorable DANIEL A. DEPASQUALE, Seneca County Court Judge, who ordered that the hearing be closed to the public and press upon the request of the defendants. In the first order the court gave as its reasons for closure that the *Huntley* hearing "is not the trial of the matter. Certain evidentiary matters may come up in the testimony of the People's witnesses that may be prejudicial to the defendant, and for those reasons the Court is going to grant both motions". During the hearing petitoner sought a postponement to argue its right to be present and to have access to transcripts of the completed portion of the hearing. Petitioner's request was denied and the hearing remained closed. Thereafter petitioner moved to vacate the closure order *nunc pro tunc* and for immediate access to the completed stenographic transcripts of the suppression hearing. The County Court once again denied the relief requested "on the theory that under the special and unusual circumstances—one of these two defendants being 16 years of age—that there was a reasonable probability of prejudice to the defendants, and the Court therefore found it necessary to [109] grant the motion". Petitioner is now seeking to vacate and prohibit enforcement of both the oral order of closure and the subsequent written order which denied petitioner's motion to vacate the closure order *nunc pro tunc* and for immediate access to the transcripts of the hearing.

This proceeding presents a basic conflict between petitioner's First and Sixth Amendment right to attend criminal proceedings and publish information with regard thereto and the constitutional right of the defendants to receive a fair trial before an impartial jury. The issue is whether the public and representatives of the news media may be excluded from a pretrial suppression hearing concerning the voluntariness of alleged confessions and admissions on the ground that an open hearing would create a reasonable probability of prejudice to the defendants.

The accused in a criminal prosecution has a constitutional right to a public trial (US Const, 6th Amdt; *Duncan v Louisiana,* 391 US 145; see, also, *Matter of Oliver v Postel,* 30 NY2d 171; Judiciary Law, § 4; Civil Rights Law, § 12). But the public trial guarantee does not inure to the benefit of the accused alone. The public has a vital interest in open judicial proceedings, especially criminal proceedings, to insure that the integrity of the judicial process remains intact. Public trials "serve to instill a sense of public trust in our judicial process by preventing the abuses of secret tribunals as exemplified by the Inquisition, Star Chamber and *lettre de cachet*" (*People v Hinton,* 31 NY2d 71, 73; *United States ex rel. Lloyd v Vincent,* 520 F2d 1272, cert den 423 US 937). "The searchlight of a trial which is open to the public serves as a restraint against the abuse of judicial power" (*United States ex rel. Bennett v Rundle,* 419 F2d 599, 606; *Matter of Oliver,* 333 US 257, 270; *People v Jelke,* 308 NY 56, 62). "A trial is a public event. What transpires in the courtroom is public property" (*Craig v. Harney,* 331 US 367, 374).

Precisely because "the public at large has a vital stake in the concept of a public trial" (*People v Hinton, supra,* p 73), the circumstances under which a trial court may order closure have been closely circumscribed. Closure is permitted only in "unusual circumstances" (*People v Hinton, supra*) or upon a clear showing that such an order

is required to prevent "a serious and imminent threat to the integrity of the trial" (*Matter of Oliver v Postel, supra,* citing *Craig v Harney,* 331 US 367, 373, 377, *supra;* see *Matter of Hearst Corp. v Cholakis,* [110] 54 AD2d 592). A closed trial order "constitutes an exception to the general rule requiring open judicial proceedings * * * and may only be employed as a response to compelling factual circumstances. The discretionary judgment which bars the doorway to a courtroom must be 'sparingly exercised and then, only when unusual circumstances necessitate it' (*People v Hinton,* 31 NY2d 71, *supra* * * * *People v Devine,* 80 Misc 2d 641)" (*Matter of Gannett Co. v Mark,* 54 AD2d 818, 819). An exclusionary order must be supported by a factual showing of prejudice to the defendant (*Matter of Hansen v Kelly,* 38 AD2d 722). Where no showing of prejudice has been made, an order closing the courtroom is inappropriate and must be vacated (*Matter of Hearst Corp. v Cholakis, supra*). The guiding principle is that a court is a public facility from which the public and press cannot be excluded except when there is a showing of a compelling reason for such action (*Matter of Gannett Co. v Mark, supra*).

The exclusionary order entered by the County Court is not supported by a showing of compelling factual circumstances. Respondent DePasquale indicated that the reason for closure was the reasonable probability of prejudice to the defendants. The only factual reason given is that one of the defendants is 16 years of age. There is no further reason given. No finding was made concerning the extent of pretrial coverage in the case, the impact which the disclosures would be expected to produce, the size of the prospective jury pool in Seneca County nor as to any other matter that would indicate with a reasonable amount of certainty that the defendants could not receive a fair trial in Seneca County without a closed *Huntley* hearing. The closure order entered here lacks the requisite factual basis necessary to overcome the right of the public and press to open judicial proceedings.

There is a second infirmity in the County Court order which overshadows the right of the public to open judicial proceedings. The exclusionary order entered here infringed petitioner's First Amendment rights in that it constituted a violation of the right of the press to publish free from unlawful governmental interference. It is clear that a closed trial order restricts media access to information ordinarily made available to the general public. By denying access to the media a Trial Judge can effectively prevent the publication of testimony or other information deemed prejudicial to the accused. It is this feature of the instant closed trial order that is [111] attacked by petitioner as an infringement upon its First Amendment rights. Logic compels the conclusion that where an exclusionary order is entered merely as a substitute for a "gag order" which would otherwise place a direct restraint on what the press can publish, such exclusionary order infringes upon protected First Amendment rights. An exclusionary order is merely a substitute for a direct prior restraint where, as here, the sole purpose behind the order is to *prevent the publication* of what transpires in the courtroom during a pretrial hearing.

The fact that such an order "constituted a novel form of censorship cannot insulate or shield it from constitutional attack" (*Matter of Oliver v Postel,* 30 NY2d 171, 183, *supra*). "In the area of 'indispensable' First Amendment liberties, the Supreme Court has been careful 'not to limit [their] protection * * * to any particular way of abridging it' (*Grosjean v American Press Co.,* 297 U.S. 223, 249; see, also, Communications Assn. v. Douds, 339 U.S. 382, 402; *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 461), since 'abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action.' (*N.A.A.C.P. v. Alabama,* 357 U.S. 449, 461, *supra.*)". Where an exclusionary order is directed at the press to prevent the publication of material prejudicial to the defendant, First Amendment rights are abridged to the same

degree as in the case of a "gag order" directing the press not to publish the asserted prejudicial information.

The County Court excluded the public and press from the *Huntley* hearing due to the reasonable probability of prejudice to the defendants inherent in conducting an open proceeding. The prejudice to which the County Court was referring was the possibility that massive pretrial publication of the defendants' confessions and incriminating statements would infect prospective jurors with such prejudice against the defendants, conscious or unconscious, that they could not receive a fair trial in Seneca County. (See *People v Pratt,* 27 AD2d 199.) While this possibility certainly exists, the purpose behind the exclusionary order unmasks it as a substitute for a gag order that would otherwise place a direct restraint on the right of the press to publish.

Prior restraint on speech and publication is "the most serious and least tolerable infringement on First Amendment rights" (*Nebraska Press Assn. v Stuart,* 427 US 539, 559). [112] "[O]nly the most exigent circumstances warrant the issuance of an order curtailing the right of the press to publish. All other measures within the power of the court to insure a fair trial must be found to be unavailing or deficient" (*Matter of New York Times Co. v Starkey,* 51 AD2d 60, 64). The reviewing court must examine the evidence before the Trial Judge when the order was entered to determine (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; (c) how effectively a restraining order would operate to prevent the threatened danger. The reviewing court should then consider whether the record supports the entry of a prior restraint on publication (*Nebraska Press Assn. v Stuart, supra,* p 562).

Applying these standards to the order under review we find that the "heavy burden imposed as a condition to

securing a prior restraint" has not been met here (*Nebraska Press Assn. v Stuart, supra,* p. 570). Respondent made no findings with regard to the nature and extent of pretrial news coverage. Nor did Judge DePasquale inquire into whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity. And no determination was made as to how effectively the exclusionary order would operate to prevent the threatened danger (*Nebraska Press Assn. v Stuart, supra,* pp 562-567). The record in the instant case clearly does not support the entry of respondent's restrictive order barring the public and press from the defendants' *Huntley* hearing. The reasons set forth by the County Court cannot justify the violation of First Amendment rights evident here.

Petitioner has also asserted a due process right to notice and a hearing prior to the entry of exclusionary orders which are directed at the press to prevent the publication of matters prejudicial to the defendant in a criminal proceeding. Such rights have been accorded to the press in cases involving direct prior restraints (*Matter of New York Times Co. v Starkey, supra; United States v Schiavo,* 504 F2d 1), and similar rights should be accorded to the press where a trial court contemplates entering an exclusionary order for the purpose of suppressing pretrial publicity deemed prejudicial to the defendant.

The record shows that the closure order under review was entered specifically to prevent petitioner from disseminating the inherently prejudicial disclosures that inevitably follow [113] from a *Huntley* hearing. Respondent DePasquale was undoubtedly motivated by a concern that the defendants receive a fair trial in Seneca County, yet the purpose behind the closure order was unquestionably to prevent such information from reaching the eyes and ears of prospective jurors. In this respect the order constituted a prior restraint on petitioner's freedom to

publish what transpired during the *Huntley* hearing. For this very reason respondent's order violated petitioner's First Amendment rights (see *State ex rel. Dayton Newspapers v Phillips,* 46 Ohio St 2d 457). Judged by the standards enunciated in *Matter of Nebraska Press Assn. Co. v Stuart (supra),* the closure order entered here cannot withstand petitioner's constitutional challenge.

For the reasons stated, the orders of the County Court should be vacated and the petitioner should be granted immediate access to the stenographic transcript of the pretrial *Huntley* hearing.

MOULE, J. P., SIMONS, DILLON and GOLDMAN, JJ., concur.

Application unanimously granted without costs. Orders vacated and matter remitted to Seneca County Court in accordance with *Per Curiam* opinion.

Exclusionary Order of Seneca County Court, Dated November 4, 1976

STATE OF NEW YORK COUNTY COURT

COUNTY OF SENECA.

THE PEOPLE OF THE STATE OF NEW YORK

-against-

DAVID RAY JONES and KYLE EDWIN GREATHOUSE,

Defendants.

Indictment Nos. 76-18 and 76-19

MINUTES OF PROCEEDING held before HON. DANIEL A. DE PASQUALE, Seneca County Court Judge, on the 4th day of November 1976.

APPEARANCES:

WALTER J. WARD, ESQ., District Attorney
THOMAS L. JONES, ESQ., as Public Defender for Kyle Edwin Greathouse
STUART O. MILLER, ESQ., as Public Defender for David Ray Jones
DEFENDANTS, Present in person
FREDERICK MOREHOUSE, Deputy County Clerk
KAY L. ROCKWELL, Official Court Reporter

MR. JONES: Before Mr. Ward proceeds, your Honor, I have two motions that I would like to direct to the procedural aspects of this proceeding. Since we are going to take evidentiary matters into consideration here that may or may not be brought forth subsequently at a trial, on behalf of the defendant Kyle Greathouse I would move that the public and the press be excluded from this hearing.

THE COURT: Mr. Miller?

MR. MILLER: Your Honor, on behalf of David Ray Jones, I make the same motion.

THE COURT: What is your second motion?

MR. JONES: The second motion, your Honor, is that other than the witness testifying at a particular time all witnesses be excluded until after they have completed their testimony.

THE COURT: All right. Now, you understand that the constitutional rights of the defendants—they are entitled to a public and speedy trial and the exclusion of the press and the public, this is being made at your request, and it does abridge the rights, the constitutional rights, of the defendants?

MR. JONES: I fully understand that, your Honor, but this is not a trial, it is a hearing, and I think the dilatorious effects far outweigh the constitutional rights, and I would certainly renew that motion.

THE COURT: And you will renew for the same reasons, Mr. Miller?

MR. MILLER: My motion stands, your Honor. I have discussed this with my client, and that is my motion. I also move to exclude any and all witnesses who are not in fact testifying from the courtroom.

THE COURT: Mr. Jones, you discussed this with your defendant, Mr. Greathouse, is that correct?

MR. JONES: Yes, we have discussed procedural aspects.

THE COURT: All right. The Court is going to grant both your motions, but before I do, Mr. Ward, do you wish to be heard with respect to the motions?

MR. WARD: No, your Honor. I stated earlier that I thought it was up to the defense, and I would not oppose what they wished to do.

THE COURT: Therefore the Court is going to grant the motion, since these matters are in the nature of a Huntley hearing and suppression of physical evidence, and it is not the trial of the matter. Certain evidentiary matters may come up in the testimony of the People's witnesses that may be prejudicial to the defendant, and for those reasons the Court is going to grant both motions.

Certification

STATE OF NEW YORK COUNTY COURT

COUNTY OF SENECA.

THE PEOPLE OF THE STATE OF NEW YORK

-against-

KYLE EDWIN GREATHOUSE and DAVID RAY JONES,

Defendants.

I, KAY L. ROCKWELL, an Official Court Reporter for the Seneca County Court, do hereby certify:

THAT, I attended the proceeding held in the above-entitled matter on the 4th day of November 1976; and

THAT, the foregoing, consisting of pages 2 through 4, is a true, accurate, and complete transcript of a portion of the said proceeding.

Dated: November 17, 1976

/s/ KAY L. ROCKWELL
Kay L. Rockwell

Exclusionary Order of Seneca County Court, Dated November 17, 1976

At a Trial Term of the County Court, Seneca County, held at Waterloo, New York on November 16, 1976.

PRESENT:

HON. DANIEL A. DE PASQUALE,
County Court Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs,

-against-

KYLE EDWIN GREATHOUSE and DAVID JONES,

Defendants.

ORDER

INDICTMENTS 76-18, 76-19

UPON the motion of Gannett Co., Inc., brought by Order to Show Cause and an affidavit in support thereof dated November 8, 1976, to vacate the previous order of this Court which precluded the public and reporters and representatives of Gannett Co., Inc. from attending the suppression hearing held herein pursuant to Article 710 of the Criminal Procedure Law; to admit said individuals to said hearing *nunc pro tunc* as of its commencement; and to grant to Gannett Co., Inc., its reporters and representatives access to the transcript of said hearing immediately upon the completion of said transcript; and

after hearing argument on November 9, 1976 and November 16, 1976 by Nixon, Hargrave, Devans & Doyle, Robert C. Bernius, of counsel, on behalf of Gannett Co., Inc., in support of said motion; and by Thomas Jones, attorney for defendant Greathouse; Stuart Miller, attorney for defendant Jones; and the Seneca County District Attorney, all three of whom appeared specially in opposition thereto; it is hereby:

1. ORDERED, that the motion is in all respects denied; and it is further

2. ORDERED, that the suppression hearing conducted by this Court on November 4-5, 1976 is to be closed to the public for the reasons appearing in the transcript of the oral decision of the Court annexed hereto; and it is further

3. ORDERED, that the application of Gannett Co., Inc. for access to the transcript of said suppression hearing upon the completion of said transcript, is denied, ~~pending completion of the trial herein,~~ for the reasons specified in the transcript of the oral decision annexed hereto and made a part hereof.

Dated: November 17, 1976

ENTER:

/s/ Daniel A. DePasquale

HON. DANIEL A. DE PASQUALE
County Court Judge

/s/ Stuart O. Miller 11/17/76
/s/ Walter J. Ward 11/17/76
/s/ Thomas L. Jones 11/17/76
/s/ Robert C. Bernius 11/17/76

Transcript of Proceedings, Dated November 16, 1976 Incorporated Into Exclusionary Order of November 17, 1976

STATE OF NEW YORK COUNTY COURT

COUNTY OF SENECA.

THE PEOPLE OF THE STATE OF NEW YORK

-against-

KYLE EDWIN GREATHOUSE and DAVID RAY JONES,

Defendants.

Proceedings held before HON. DANIEL A. DE PASQUALE, Seneca County Court Judge, on the 16th day of November 1976 in the Seneca County Courthouse at Waterloo, New York.

APPEARANCES:

WALTER J. WARD, ESQ., District Attorney
THOMAS L. JONES, ESQ., as Public Defender for defendant, Kyle Edwin Greathouse
STUART O. MILLER, ESQ., as Public Defender for defendant, David Ray Jones
ROBERT C. BERNIUS, ESQ., Attorney for Gannett Co., Inc.
KAY L. ROCKWELL, Official Court Reporter

THE COURT: The Court has listened to the arguments and it has filed the memorandum of law which you handed up to the Court, Mr. Bernius. It occurs to this Court that the hearing to which your paper chooses to intervene has already concluded, and the only thing that remains from the hearing is the decision of this Court,

to which you concede, and very readily concede, that that is not to be made available. The decision is not to be made available to the press, to the public, but only to counsel.

It is very unfortunate that you were not here when the motion was made, but the motion was made and it was made with the moving force behind the motion being the rights of the defendants to a fair trial. It was alluded to by counsel that since this was a suppression hearing and certain evidentiary matters may have been testified to, and had they been reported by the press, the defendants would not be able to get a fair trial. The Court in granting the motion—which motion was joined in by the District Attorney or it was without objection from the District Attorney—was granted by the Court on the theory that under the special and unusual circumstances —one of these two defendants being 16 years of age— that there was a reasonable probability of of [*sic*] prejudice to the defendants, and the Court therefore found it necessary to grant the motion.

Now the issue is whether there should be a transcript afforded to the press prior to the decision being rendered. The Court is faced with that decision as to whether a transcript of the proceedings would be made available to the press at this point, or to the Gannett Company, because unfortunately the hearing had been concluded prior to your intervention, and the Court has afforded the Gannett Company a forum to be heard relative to its motion excluding the public and the press.

The Court has had a brief opportunity to study the memorandum of law which you submitted, Mr. Bernius, and point two is a point that the Court finds very much a point that may not be very easily decided, because, "There is inadequate factual basis for exclusion of the public and press." I have not had an opportunity to study the authorities that you cite. Should this burden be placed on the defendants who choose to abridge their

own constitutional rights for the sake of their concern and their rights to a fair trial? I do not believe that there are any authorities that make it incumbent upon the defendant, or defendants in this case, to present a factual basis for the exclusion of the public and press.

This is going back to what I stated in the very beginning, that it seemed to this Court that there was a reasonable probability of prejudice to these defendants. Nothing that you said in your oral arguments—I have not examined each and every case which you cited—but there is nothing that you said here, I do not believe, that would change that. This Court still believes that there was a reasonable probability of prejudice to these defendants had the press and the public not been excluded. The Court has afforded the Gannett papers an opportunity to intervene and come in and be heard with respect to the motion which the Court granted. Rather than make a hasty decision—and the Court is inclined—perhaps from remarks that have already been made by the Court, that it has carefully reconsidered the motion which was made on behalf of the defendants, and there is no real moving force for this Court to change its ruling on the motion, taking into consideration, of course, all of the facts and circumstances and everything that has been before this Court including what has happened here this morning. Actually, the urging by the Gannett newspapers for this Court to reverse its decision, there is no real basis for it.

In light of the facts and circumstances of this case, let me say this, that this Court has very sparingly invoked the rule of excluding the public and the press from any hearings and any trials happening in this particular court. There is nothing that has been presented, really, with any basis for changing, or the fact that when the particular motion was made that the Court granted the motion based on the reasonable probability of prejudice to the defendant. However, the Court will study the

memorandum of law and may be arriving at a different conclusion after examining the authorities. I want to give you every benefit of the doubt here, so I will take the time to go over your brief and the authorities that you have cited and go over the authorities that the attorneys for the defense and the District Attorney cited.

If you would like to address yourself to what I have stated, you may, Mr. Bernius, because I do want to make a decision here that is in all fairness. I want to very carefully balance the rights of the public to know and the defendants' rights to a fair trial, and this is actually what this Court is very concerned about.

MR. BERNIUS: Your Honor, the press and the public have the constitutional right to attend this proceeding. There must be a showing, a factual showing, sufficient to overcome that right, which means that the presence of the public and the press, which in some specific manner establish a compelling necessity having a direct adverse impact upon the proceeding of a substantial magnitude [*sic*]. Secondly, there must be a factual showing that there are no alternative means of remedying that problem, and the only thing that has been mentioned today, both by counsel and with all due respect by the Court, is that there is a reasonable probability that the defendants' case would be prejudiced. With all due respect, your Honor, no one has said why the defendants' would be prejudiced by the press. In fact, Mr. Jones has suggested that there is an alternative remedy, which would be a change of venue.

We are laboring in the dark, your Honor, and I would ask your Honor to put on the record why there are no alternative remedies and how the defendants would be prejudiced in order that we could make a determination whether or not we would feel that that would be a sufficient reason for excluding us. In the case of an undercover officer whose life was threatened, fine, but we have nothing at this point, your Honor. There is no order.

THE COURT: There was no trial on the date of the hearing of the matter. It was a suppression hearing, and the hearing had been concluded when you or your newspaper chose to intervene—or just short of its conclusion by a matter of minutes—and now the Gannett papers come in after the hearing is concluded to request a transcript of the proceedings. As counsel stated, after the conclusion of the hearing the only thing left that remains is the decision to be made with respect to the admissibility of the evidence, to which you conceded that there is no right to. So to come in after the conclusion of the hearing to request the defendants to show some factual basis, you cannot put that burden upon a defendant. A motion has to be ruled upon when it is made—then and there at the time that it is made.

The Gannett newspapers knew that the matter was scheduled for a hearing, they did have an opportunity to have counsel present on that particular morning that the motion was made, and unfortunately there was no representative of the Gannett newspapers. There may have been a reporter present in your newspaper who was excluded, but following the conclusion of the hearing—then to say, "Well, let's put the burden on these defendants to show on a factual basis where they are going to be prejudiced," is being unreasonable. You have to go back to when the motion was made, and at the time the motion was made, it was made on behalf of the defendants who were facing very serious charges, and as counsel stated, it was a sensitive hearing. With the age of the defendants and everything being taken into consideration and the fact that the People were joining in, or not objecting to the motion, the Court at that time ruled on the motion, and the basis for its ruling being that there was a reasonable probability of prejudice to the defendants.

The Court is well aware of the constitutional rights of the press and of the public and of the defendants, and it has tried to afford you every opportunity to reconsider its decision in light of the authorities. I think we are faced with a very unique situation here, and a very special set of circumstances that we are faced with. For that reason, there is not anything that you have presented to this Court for it to reverse its decision that was previously made. Again, this brief could have been presented to the Court at some time, perhaps earlier, for its consideration. The Court has had an opportunity to very cursorily examine the memorandum of law, but has noted the authorities cited and the Court has read these cases and is very familiar with them. Very frankly, the Court does not find any reason to reverse its decision that was made at the time the hearing commenced.

MR. BERNIUS: Your Honor, do I take it that you are also denying our application for a transcript?

THE COURT: As I stated in a letter, I think the transcript is all in together with the denial of the motion and the Court not reversing its decision. That is the decision of this Court.

MR. BERNIUS: May I submit an order or should I order a copy of this transcript to serve as the basis for an order in the case concerning our application?

THE COURT: You may submit an order and along with that the record of these proceedings, if you would like.

MR. BERNIUS: Again, there is a delay, and, your Honor, each day that passes is in our estimation an injury to the press. It is now 12:15, and if it is all right with your Honor, perhaps early this afternoon I could submit an order for your signature in lieu of having to wait for a transcript of these proceedings.

THE COURT: I think that should be part of the order. The oral decision from the bench should be part of the order.

STATE OF NEW YORK COUNTY COURT

COUNTY OF SENECA.

THE PEOPLE OF THE STATE OF NEW YORK

-against-

KYLE EDWIN GREATHOUSE and DAVID RAY JONES,

Defendants.

CERTIFICATION

I, KAY L. ROCKWELL, an Official Court Reporter for the Seneca County Court, do hereby certify:

THAT, I attended the proceeding held in the above-entitled matter on the 16th day of November 1976; and

THAT, the foregoing, consisting of pages 2 through 11, is a true, accurate, and complete transcript of a portion of the said proceeding.

Dated: November 16, 1976

/s/ KAY L. ROCKWELL
Kay L. Rockwell

Order to Show Cause, Dated November 8, 1976

At a Trial Term of the County Court, Seneca County, held at Waterloo, New York on the 8th day of November, 1976.

PRESENT:

Hon. Daniel DePasquale
County Court Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs,

-against-

KYLE EDWIN GREATHOUSE and DAVID JONES,

Defendants.

INDICTMENT NO. 76-18; 76-19

UPON reading and filing the annexed affidavit of Robert C. Bernius, Esq., sworn to the 8th day of November, 1976, and upon motion of Nixon, Hargrave, Devans & Doyle, attorneys for Gannett Co., Inc., it is

ORDERED, that the People of the State of New York and the Defendants herein show cause before this Court at 10:00 a.m. on November 9, 1976, or as soon thereafter as counsel can be heard;

WHY an Order should not be entered herein vacating the previous order of this Court, which precluded the public and reporters and representatives of Gannett Co., Inc. from attending the hearing previously held herein pursuant to Article 710 of the Criminal Procedure Law, *nunc pro tunc* as of November 3, 1976, and granting to

Gannett Co., Inc. and its reporters and representatives access to the transcripts of said hearing immediately upon the completion of said transcript, and such other and further relief as to the Court may seem just and proper.

LET SERVICE of these papers upon the Office of the District Attorney of Seneca County, and upon the office of each of the Defendants herein, be made on or before the 8th day of November, 1976 at 4 p.m.

Dated: November 8, 1976

endorsed

/s/ Daniel A. DePasquale

Hon. Daniel DePasquale
County Court Judge

Seneca County Clerk's Office
FILED AND ENTERED
Nov. 9—1976
Thomas B. Inastin, Jr.
Clerk

Affidavit of Robert C. Bernius in Support of Order to Show Cause

STATE OF NEW YORK COUNTY COURT

COUNTY OF SENECA

PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs,

-against-

KYLE EDWIN GREATHOUSE and DAVID JONES,

Defendants.

STATE OF NEW YORK
COUNTY OF SENECA SS:
TOWN OF WATERLOO

ROBERT C. BERNIUS, being duly sworn, deposes and says:

1. I am an attorney-at-law, duly admitted to practice in the courts of this state, and associated with Nixon, Hargrave, Devans & Doyle, attorneys for Gannett Co., Inc.

2. I make this affidavit upon information and belief in support of the motion of Gannett Co., Inc. for access to suppression hearings held herein, and for access to stenographic transcripts of said hearings. The sources of my information are conversations with representatives of Gannett Co., Inc. and with the Hon. Daniel DePasquale in open court on November 8, 1976.

3. Gannett Co., Inc. is a public corporation duly incorporated and existing under the laws of the State of

Delaware with its principal offices located in Rochester, New York. It owns and operates *The Democrat & Chronicle,* and *THE TIMES UNION,* general circulation daily newspapers, and Channel 10-T.V., a VHF television station broadcasting in Rochester, New York.

4. Gannett Co., Inc. through its reporters and representatives, has sought to report, and to attend, both on behalf of itself and the public, the pre-trial and trial proceedings herein.

5. Gannett Co., Inc. has a right to attend and to report on said proceedings, guaranteed by the First and Sixth Amendments to the United States Constitution, Article I, §§ 6, 8 of the Constitution of the State of New York, Judiciary Law §4, and Civil Rights Law §12.

6. The order previously issued herein, barring Gannett Co., Inc. from attendance at pre-trial proceedings herein, is violative of the aforementioned rights, and was procedurally defective in a number of ways.

7. Irrevocable harm has been done to Gannett Co., Inc. by its exclusion from the proceedings herein, and said harm will continue until Gannett Co., Inc. is permitted to attend and report on all matters of record.

8. The harm done to Gannett Co., Inc. can be mitigated only by granting to it immediate access to the stenographic transcript of the proceedings from which it has been excluded, together with granting to it permission to attend said proceedings *nunc pro tunc* as of November 5, 1976, and further vacating any prior inconsistent orders herein.

9. No prior application for the relief herein requested has been made.

10. Accordingly, Gannett Co., Inc. respectfully requests that the order previously issued barring Gannett Co., Inc. from reporting on and attending the proceedings herein be vacated, that Gannett Co., Inc. be granted immediate access to transcripts of all proceedings from which it has been excluded, and that Gannett Co., Inc. have such other and further relief as to the Court may seem just and proper.

/s/ ROBERT C. BERNIUS

Sworn to before me this
8th day of November, 1976
/s/ PHYLLIS M. SMITH
Notary Public
[Illegible]